UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

PROUDLIVING COMPANIES, LLC

and **Case 22-CA-180487**

JOSE BATISTA, AN INDIVIDUAL

Michael P. Silverstein, Esq., Counsel for the General Counsel
Valerie J. Bluth, Esq., Counsel for the Respondent
Paul P. Rooney, Esq., Counsel for the Respondent

DECISION

STATEMENT OF THE CASE

JEFFREY P. GARDNER, Administrative Law Judge. The charge was filed on July 19, 2016, and the Complaint was issued on October 25, 2016. The complaint alleges that on July 15, 2016, Respondent discharged 7 of its employees in retaliation for complaining about working conditions.[1]

On January 11, 12 and 13, 2017, I conducted a trial at the Board's Regional Office in Newark, NJ, at which all parties were afforded the opportunity to present their evidence. Upon consideration of the entire record and the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

Based on the pleadings herein, and the parties' stipulations at trial, the Respondent admitted[2] and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2) (6) & (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

The Respondent, ProudLiving Companies, LLC, is one of a number of related entities collectively doing business as "ProudLiving," which provide various services, including the renovation and maintenance of apartment buildings in East Orange, NJ which are primarily at

[1] At trial, the General Counsel amended its Complaint to withdraw its allegations with respect to employee Teofilo DeJesus. Accordingly, for purposes of this decision, only seven individual employees are alleged to have been unlawfully discharged.
[2] At trial, Respondent amended its Answer to withdraw its denial of the $500,000 of revenue and $50,000 in purchases allegations, and stipulated to jurisdiction in this matter.

issue in this matter.[3] Respondent was legally formed in August 2015, and is owned and managed by TJ Caleca and Andrew Brown, both of whom testified at the hearing.[4]

Respondent's buildings were purchased with the intention that Respondent was going to renovate them, and re-lease them at higher rents. According to Caleca and Brown, the initial plan was to renovate extensively with its own employees and potentially supplement that with contractors. The acquisitions of the buildings took longer than expected so the plans as to how the buildings would be staffed and what work they would do constantly changed. Upon closing on the buildings, the plan still continued to change, sometimes multiple times a day. Caleca was more inclined to hire contractors while Brown was more interested in finding people who they could turn into long term employees, with compensation determined person by person. Caleca and Brown communicated with each other on a daily basis by text and phone about work and about Respondent's employees.

Respondent hired a Vice President of Field Operations, Angel Nuñez, who at all relevant times was entrusted almost exclusively with the hiring and direct supervision of Respondent's employees. Nuñez reported directly to Caleca and Brown, whom he spoke with regularly regarding the Respondent's employees and all of its operations, including during weekly meetings at Respondent's offices, and as needed otherwise.

The Alleged Discriminatees

Respondent employed a superintendent in each of several buildings it managed, and also hired porters to service certain of its buildings. Some of these employees had already worked in their buildings prior to Respondent's hiring them to continue working there. In addition to the superintendents and porters, Respondent hired at least one additional contractor to perform certain work on its buildings.[5]

Brown describes the typical superintendent position to be one who maintains the building by cleaning it, doing work orders, light plumbing, and light electric. Brown understood the typical superintendents' duties would not include being able to renovate an apartment. However, Brown testified that Respondent looked for superintendents who were more skilled and able to do renovation work, and anticipated paying them more money and even a bonus for the additional work they would be asked to do.

---

[3] Respondent purchased five buildings between November 2015 and April 2016 located at 100 Chestnut, 25 North Harrison, 107 New Street, 24 South Road, and 245 South Harrison, all in East Orange. Additionally, Respondent owned buildings located in East Orange, Newark, Irvington, Montclair, Paterson, and Woodland Park.

[4] Caleca also has ownership interest in the various related entities using the "ProudLiving" name, though he was unable to explain the specifics of his or Brown's ownership in Respondent, which he described as "more complicated than" simply vested ownership. Brown was also unclear about the corporate structure and the relationship between the various ProudLiving entities, as there are "50 LLCs for different structural reasons." It is undisputed that both Caleca and Brown actively participated in the management of Respondent's business.

[5] Respondent also employed property managers, leasing agents, construction workers, a bookkeeper, and people doing administrative and refinancing work.

Nevertheless, when the superintendents here were first hired, their duties only included receiving and responding to the tenants' complaints, performing maintenance work, and cleaning the buildings. They were paid $600 per week, and in addition, were given free rent in the building where they worked. The porters' duties included sweeping, mopping, taking out the garbage, and helping the superintendents in maintaining the building. Their pay varied. The contractor's duties included renovation, demolition, sheetrock, spackle, tile and whatever else he was asked to do, some of which overlapped with the maintenance duties of the superintendents and porters. He was paid an annual salary of approximately $48,000.

The Superintendents

Jose Batista began working for Respondent in the beginning of March 2016 as a superintendent at 107 New Street in East Orange. He was hired by Nuñez. Prior to coming to work for Respondent in 2016, Batista was a superintendent in that same building (107 New Street) for about 10 years. The building has five floors with 64 apartments, and had a porter. Batista was also known to his co-workers and management as "Alex."

Roger Ochoa was the superintendent at 25 North Harrison Street, East Orange, and had been the superintendent there for approximately 17 years. When Respondent purchased the building, Nuñez told Ochoa he could continue employment as superintendent of the building, working for Respondent. Although this was a large building, with nine floors, when Ochoa was initially hired by Respondent, he did not have a porter. He later got one in April 2016.

Hector Perea started working for ProudLiving on December 24, 2015 as a superintendent at 540 Park Avenue, East Orange. He also was superintendent at two other of Respondent's buildings, 496 Park Avenue, East Orange and 899 9th Avenue, Newark. He too was hired by Nuñez, whom he had known for about 20 years. 540 Park Avenue has four floors with about sixteen apartments and an elevator. 496 Park Avenue has three floors with about sixteen apartments and no elevator. 899 9th Avenue has sixteen apartments and no elevator. Perea did not have a porter at any of the buildings where he worked.

Alex Flores worked for Respondent as a superintendent at 100 Chestnut Street, East Orange, and 20 Hillyer Street, East Orange. He began working during the second week of March 2016. Flores was hired by Nuñez, although they did not know each other previously. At 100 Chestnut Street there are four floors with 28 apartments and no elevator. At 20 Hillyer Street, there are two floors with 12 apartments and no elevator. Flores did not have a porter at either of his buildings.

The Porters

Jesus Guerra worked as a porter at 107 New St., East Orange, with superintendent Batista. Guerra was hired by Nuñez, although they did not know each other previously. Guerra was paid $400 per week.

Adolfo Belteton/Castaneda worked as a porter at 25 South Harrison Street, East Orange, with superintendent Ochoa. He began working for Respondent in April 2016. Belteton's nickname was "Chino." He was paid $350 per week.

Contractor Jerome Chambers

Jerome Chambers started working for Respondent in April 2016 as a contractor. Unlike the superintendents and porters, he was hired directly by Caleca and Brown, with a salary of $48,000 a year. Chambers testified that he was supposed to get room and board and a company vehicle, but did not receive either. Like the superintendents and porters, Chambers was given his assignments by Nuñez. Chambers first started working at 100 Chestnut St., East Orange, although he worked in other locations as well. At 100 Chestnut St, he worked with a helper. Later, he worked with a different helper, his cousin, until approximately early June 2016, when that cousin quit the job. Chambers also had occasion to work together with Perea and with another superintendent, Gelmy Villegram.[6]

Brown testified that Chambers was hired in an attempt by Caleca and Brown to not have to deal with Nuñez, with whom they were beginning to become disenchanted. According to Brown, he and Caleca thought that if they could build "an independent team" of workers, "we would have control over that."

Respondent Asks for Demolition Work and Employees Object

In the Spring of 2016, a month or so after most of the employees had begun working for Respondent, a meeting was held with Caleca, Brown, Nuñez and Valerie Vargas.[7] During this meeting, Nuñez was advised that Respondent was planning to transfer some superintendent duties to the porters, and assign to the superintendents the work of demolition and renovation of vacant apartments. The plan was to renovate 10 apartments per month, and to pay the superintendents $300 per renovated apartment. The porters were to assist the superintendents, although there was no discussion of additional compensation for porters.

Caleca and Brown told Nuñez to instruct its newly hired superintendents and porters to begin performing demolition and renovation work on vacant apartments in several of its buildings. Prior to this, the superintendents and porters had been performing only the typical superintendent duties described above, in some cases for a decade or more in the same buildings, but for different employers. Nuñez testified to speaking with each of the superintendents about the new work that was going to be asked of them.

When the superintendents and porters were first told by Nuñez to perform the demolition and renovation work, the employees uniformly objected to Nuñez about the type and amount of work, and the amount they were to be paid. On multiple occasions, Nuñez relayed these complaints to Caleca and Brown, who instructed Nuñez to tell the employees that if they refused to do the work, they would be terminated.

[6] Gelmy Villegram is not an alleged discriminatee in this case, and did not testify.
[7] Vargas is Respondent's office manager, and was reported to have had first-hand knowledge of certain allegations, but was not called to testify at the hearing.

In addition to Nuñez, in late May or early June of 2016, Caleca had discussions with some of the superintendents directly. The purpose of the meetings was to tell the supers about the renovation demolition work Respondent expected them to do. Caleca acknowledges speaking to Ochoa, Batista and another superintendent, Felix Guzman,[8] at their respective buildings. Caleca spoke to Ochoa first, then Batista, then Guzman over the course of one day. Although Caleca claims not to recall speaking to Ochoa about money, text messages from June 1, 2016 reveal Caleca texted Brown that Ochoa was complaining about doing additional work and was upset when Caleca offered $300 extra. Brown admitted that he had been notified by Caleca that the supers were unhappy with the work they were being assigned.

When Caleca met with Batista, they specifically spoke about how much money Respondent was paying for demolition and renovation work. Although Respondent maintains that all such discussions were about individual grievances, Caleca texted Brown following his discussion with Batista, stating that Batista wants $1200 and that "these guys are petty, little shit bags," demonstrating his understanding that the requests for money were about more than just one individual.

Caleca also spoke to superintendent Guzman that day about performing demolition work. According to Caleca, when he offered $250 per apartment, Guzman was initially happy. However, also according to Caleca, Guzman later became unhappy when he apparently learned that Respondent was paying the other superintendents more money. Caleca acknowledged being made aware that Guzman had spoken with Batista about the proposed demolition bonuses, and shared that information with Brown. In response, Brown sent a text message to Caleca, stating, "We can just fire Alex today if we have to. He can't undermine us. Fuck him."

Brown acknowledged that the "Alex" he was referring to here was Batista, and the "undermin[ing]" related to the conversation with Guzman about money, but Brown claims that what he meant by saying "he can't undermine us" was in reference to Nuñez, not Alex, telling Guzman that they were paying Batista more money than they were paying him. I find this attempt to explain away a damning piece of evidence – one which was both in writing and admitted to by Caleca – thoroughly unconvincing. Indeed, I find that it undermines Brown's credibility.

After his conversations with these superintendents, Caleca and Brown discussed the demolition bonuses and superintendents' requests for more money. At that time, they agreed that they were going to increase the proposed $250 bonus to $500 per apartment for all the superintendents. They conveyed this to Nuñez, who in turn told the superintendents.

Batista's and Guerra's Initial Response

In or about April 2016, Nuñez went to 107 New Street and told Batista (in Spanish) that he and the building's porter, Jesus Guerra, would have to perform construction work, including demolishing apartments that were empty and remodeling them. In response, Batista told Nuñez

[8] Guzman is not an alleged discriminatee in this case, and did not testify.

that it would be too much work for just two people, as Batista also had to take care of tenant complaints and clean.

Some weeks later, Caleca asked Batista and Guerra to go to a specific apartment and demolish all the walls of the bathroom, take away the toilet and sink, remove the living room floor, and smooth the walls. Guerra was with Batista during this conversation. Caleca advised Batista that he would be paid $200 for the job, but Batista told Caleca it was worth about $1,200. Caleca told Batista to not talk about money in front of Guerra. Batista described Caleca as angry that he requested $1,200 because Caleca said this work was included in Batista's job duties, which included to "turnover" apartments.

Batista described "turnover" as when someone moves out, leaving the apartment in poor condition, a super goes in and cleans and paints it so it may be inspected by the city. Batista distinguished normal turnover work from what Caleca requested him to do because Caleca's request included demolishing a whole wall and ripping up the floor in an apartment that was in good condition and ready to be rented. In the 10 years that Batista worked as a super at 107 New Street, he had never been asked to do the sort of work that Caleca requested he do.

After Caleca left, Batista had a conversation with Guerra in Spanish about Caleca's offer of $200 and Batista's counteroffer of $1,200. Several hours later, Nuñez spoke with Batista in the parking lot of the building. Batista explained that Caleca requested he demolish the apartment but that the amount he offered was too little because the buildings are concrete. Batista stated he would do all the demolition of the apartments if his salary was raised to "at least $850 per week." Nuñez told Batista he was going to talk to the office.

Later that night, Nuñez told Batista that Caleca would pay Batista $500 per apartment for demolition and renovation. Batista was advised that he would have to demolish one apartment daily, and was expected to do about seven per month. Batista was expected to work with Guerra. Specifically, Batista and Guerra were to demolish the apartment, throw away all the leftovers, debris and redo the apartment. If a tenant complaint came up, Batista was to leave Guerra doing the work and to go perform his normal duties.

Batista and Guerra proceeded to demolish three apartments - they took out the walls, and took away all the tiles of the bathroom, took out the toilets, took out the sink and took out the floor of the living room. Each apartment demolition took two days. Batista spoke to Guerra about how the demolition was not part of their job duties, and Batista told Guerra about the $500 per apartment Nuñez had said Caleca would pay Batista, though Batista never actually received the $500 for the apartments he worked on, nor any extra compensation.

Ochoa and Belteton's Initial Response

At around the same time as he initially approached Batista and Guerra, Nuñez also had a conversation in Spanish with Ochoa, telling him that he would have to do demolition work. Like Batista, Ochoa objected, and Nuñez informed Ochoa that Caleca would come to talk to him about it. Later that day, Caleca did come to speak to Ochoa and told him that a bathroom had

to be redone. Caleca made the same offer he had made to Batista, telling Ochoa he would receive his regular salary and an additional $200 per apartment.

Ochoa informed Caleca that it would typically cost thousands of dollars and that he wasn't going to do it for free. Ochoa told Caleca that he would need $1,000 for doing the bathroom and apartment or he was going to find another job.[9] Belteton was present for this conversation, but because they were speaking in English, Belteton could not understand what was being said.

After, Ochoa and Caleca's conversation ended, Ochoa translated for Belteton, telling him about the additional work they would have to do. Belteton responded to Ochoa that it was too much, and they would not be able to do it, but Ochoa told him that was what Respondent wanted.

Ochoa and Belteton did perform some demolition work in one apartment. Ochoa worked on it with Belteton for an hour and then left him to complete it. Belteton took tiles out of the wall, removed garbage, put up sheetrock, and left the apartment ready to be framed. Ochoa told Belteton that Respondent was going to pay $350 for each remodeled apartment and Belteton would receive some of that money.

In addition to their conversations with management, Ochoa and Batista also spoke to each other about the demolition work, and about requesting more money from Caleca. Also, Guerra and Belteton spoke over the phone about the new demolition work Respondent was asking them to do.

Flores's Initial Response

Nuñez advised Flores that he would have to do demolition work while they were outside of Flores' building about a month and a half after Flores began working for Respondent. Specifically, Nuñez said that the owners were demanding that the superintendents do demolition and renovation of the apartments, as soon as possible. Flores told Nuñez that this was not what he was hired for and Nuñez responded that it was not his decision but that of Caleca and Brown.

In response, Nuñez told Flores that if he didn't do the work he would be fired. Flores asked Nuñez if they were going to be paid more, and Nuñez told him that the owners said they were going to give a bonus at the end of the year. Flores told him he wouldn't believe it until he got something in writing.

After being told this by Nuñez, Flores spoke to Batista, Ochoa and Villegram over the phone. Flores remembers asking Batista if he heard about the demolition requests and they agreed that this was not a part of the job agreement. He had a similar conversation with

[9] Notwithstanding that this exchange was with Caleca, Ochoa continued to work for Respondent well after this conversation.

Chambers also complained about his working conditions

Unlike, the superintendents and porters, Chambers was specifically hired to perform demolition and renovation work. Nevertheless, upon receiving certain assignments from Nuñez, Chambers joined the others with complaints about the work. In April or May, Chambers and his helper were doing demolition in the bathrooms and kitchens at 100 Chestnut for about two weeks when Nuñez told Chambers to stop doing what he was and go to another building, Osbourne Terrace in New York, to finish a unit because Respondent wanted to rent it and needed it completed.

At Osbourne Terrace, Chambers and his cousin worked for approximately one week on the first floor unit and the basement. He and his cousin also worked at various other buildings owned by Respondent, until his cousin quit. When that happened, Chambers asked Nuñez for someone to help because he felt there was too much work for one person. Nuñez told Chambers that he would speak to Caleca.

Chambers asked Nuñez about three or four more times for help - once in person and the rest over the phone. Chambers also texted Caleca asking for help, which Caleca acknowledged in his testimony. Caleca also testified that Chambers and he fought about the money he was being paid.

Employees often spoke with each other about their working conditions

In addition to the instances described above, there was an abundance of additional testimony regarding employees speaking with each other about their terms and conditions of employment. It happened frequently among various groups of employees, and included every one of the alleged discriminatees.

In or about June 2016, Ochoa and Belteton went to Batista's and Guerra's building for approximately four hours to work on a water tank, at the direction of Nuñez. While doing that project, the employees spoke about their excess work, about the demolition work being too much, and about their not yet receiving additional pay. Nuñez was present, and heard the employees' collective complaints.

While working together on the plumbing at an apartment at 540 Park Ave., Perea and Villegram conversed about how they had been assigned too much work. Athough no one had specifically spoken with Perea that he would be paid extra for the demolition work, he was clearly aware of the subject, and took part in discussions with his coworkers on the subject. Specifically, while working at 25 Harrison upon Nuñez's request to take out an oil tank, Parea spoke with Ochoa, Villegram and Guerra about the demolition and how it was not their regular job duty. Nuñez was also present for this conversation.

In addition, there was another conversation between Perea, Ochoa, Batista and Villegram which took place in the parking lot of 25 North Harrison about how Respondent was giving them too much work and should not be moving them to and from different buildings.

On another occasion, in response to Chambers's requests for assistance, Nuñez sent Perea to work with Chambers for approximately two weeks. During that time, they spoke on a daily basis about how Respondent was treating its employees. Perea complained about the way the employees were getting treated and the amount of money they were being paid. Perea told Chambers he was going to quit if they didn't give him a raise. In turn, Chambers complained to Perea about how he had no one helping him, and Perea agreed it was too much work for one person.

On still another occasion, Chambers spoke with both Perea and Villegram about working conditions. Chambers complained that he had to travel to Home Depot to pick up materials and had no one to help him. Villegram also complained about having issues picking up material and having to put it in his car. Later, in July 2016, Chambers and Villegram were again working together, and again spoke about how they were being mistreated and how everyone was mad at Respondent.

Employees meet with Nuñez to discuss their situation

Nuñez testified that he told Caleca and Brown at least a dozen times about the employees' complaints. Their response, which he conveyed to the employees on multiple occasions, was that they needed to do the jobs and if they did not do the jobs they would be fired. The employees were unhappy as they felt it was a lot of work to be done which would require them to work long hours and for not enough pay. As discussed above, they talked about their complaints with each other, and raised their collective complaints to Nuñez repeatedly. In response to their continuing complaints, Nuñez kept saying he would try to speak again to Caleca and Brown.

Finally, in July 2016,[10] with the complaints continuing, Nuñez arranged a meeting at one of Respondent's buildings, 24 South Grove St., for the superintendents of Respondent's buildings, including Batista, Ochoa, Villegram, Guzman, and someone named "Freddy."[11] At the meeting, Nuñez stated that Caleca required all the supers to demolish one apartment daily and seven per week and again that anyone who did not do so would be fired.

Nuñez expressed his own opinion that Caleca was requesting a lot of work out of them and that he himself was going to quit. Batista agreed that it was a lot of work, and told Nuñez that he had completed a job and had not been paid, and that if Respondent was going to continue to demand the same work, he was going to look for another job.

The employees at this meeting expressed to Nuñez that the company was abusing them because they were requiring them to do a type of work (demolition and renovation) that they weren't supposed to do. They stated they knew the laws and were going to go to the Department of Labor. At the time of the meeting, the employees had not yet been fired, and Nuñez recommended that the employees find another job before leaving this job.

[10] There was some consistency as to the precise time and date of the employees' July meeting with Nuñez. However, it is uncontradicted that the meeting was on or shortly before July 15, 2017.

[11] "Freddy" was not otherwise identified, is not an alleged discriminatee in this case, and did not testify.

Nuñez shares employee complaints with Caleca and Brown

As mentioned above, throughout the Spring of 2016, Nuñez had been telling Caleca and Brown that the employees were complaining about the work they were asking to do, and the pay Respondent was offering. Although Respondent has taken the position that Caleca and Brown were unaware of the employees collectively lodging these complaints, I find that position to be not credible, particularly in light of their admission that Nuñez was their point person regarding all things related to work on these buildings, and management had weekly meetings to discuss the work. In addition, in their own text messages, they speak in the plural about "employees" and "guys" complaining, and in at least three cases, the employee complaints had been made directly to Caleca.

Notwithstanding that history of prior complaints, on the day of the employees' termination, Nuñez reported the employees' collective complaints a final time. After that July 2016 meeting, Nuñez went to the office and spoke to Vargas,[12] telling her about the employees collective complaints, "giving the complaint about the supers the --- and the porters." employees had gotten together for a meeting and the employees' collective complaints. Vargas then called Brown, with Nuñez present, and told him that "the guys were complaining," and that Nuñez was there to convey their complaints. Vargas then told Nuñez that Brown was coming to the office, and that he should wait to speak with Brown.

Approximately 30 minutes later, Brown arrived at the office, and told Nuñez that he was tired of the superintendents' complaints, and blaming Nuñez for contributing to the employees' unhappiness because he was "creating whispers, talking, gossiping with the supers" and that "the supers were unhappy because of" Nuñez.

That same day, all seven discriminatees were discharged. Respondent prepared termination letters for Batista, Ochoa, Perea, Flores, Guerra, Belteton and Chambers. Respondent also terminated Nuñez that same day, with his final duty being to deliver the termination letters to the fired employees.[13] According to Brown, he and Caleca discussed which employees to fire in the car ride to the office that day. According to Caleca, they made the final decisions in the office that day, though their issues with the various employees had preceded that day. According to Brown, Vargas drafted the letters that same afternoon after he notified her of who was being terminated.

Respondent's proferred reasons for terminating employees

Respondent maintains that the terminations of all of the discriminatees was due to a change in business plan and/or the termination of Nuñez, specifically, and a decision to outsource the demolition work. Caleca testified that Respondent first considered firing Nuñez around November or December of 2015, before any of the employees had even been hired, and

[12] By this point, Vargas had been promoted from Office Manager to Vice President of Operations.

[13] Nuñez had earlier told Caleca and Brown that he no longer wanted to work in management, and they had discussed his staying in that role through the month of July 2016, in order to find an appropriate replacement, and transition to new management. However, he was fired along with the other employees and not permitted to work the remainder of the month.

continued to consider doing so once a week thereafter. Caleca stated that Respondent never fired him sooner because they were desperate, and he was better than nothing.

However, Caleca testified that Respondent was forced to terminate Nuñez ahead of schedule because Nuñez was allegedly screaming in the office, frightening people, including Vargas. This was apparently the same time Nuñez had reported to Vargas about the employees' meeting.[14] Caleca claims that during the car ride over, he and Brown discussed terminating employees who have not improved. Brown testified that the final decision to fire them was made that very day.

Despite denying that he was aware of the employees' complaints, according to Caleca, Respondent had developed a new business plan of having outside companies perform the bulk of the demolition work, having superintendents go back to regular superintendent duties, and no longer having a need for porters. He acknowledged that the cost of hiring outside companies to do the work was four times what Respondent had agreed to pay the superintendents, and was still more expensive than if Respondent had agreed to pay the superintendents as much as Batista had initially requested.

Respondent maintains that Chambers was fired on July 15 because he was not a good employee. Caleca testified that he believed Chambers was not performing up to par as early as his second day when it took him an entire day to demolish a five by two space, and did so sloppily. Caleca also testified that he discovered Chambers couldn't do things that he originally stated he could do, and that he was slow. Caleca maintains that he had considered firing Chambers when he first noticed his performance problems and continued to consider it every couple of days for the entire duration of Chambers' employment. Caleca acknowledged that Chambers requested help with the work, and that he had fought with Caleca about his compensation.

Respondent maintains that Flores was fired on July 15 because Caleca had a problem with his performance as well. Caleca testified that Flores was not at his building on multiple occasions when he was supposed to be, and that he was not cleaning the building properly. Nuñez agreed that Flores needed to be replaced. Flores was actually fired twice. After the first firing, Flores asked for his job back and Respondent gave him a second chance. However, despite taking him back, Flores allegedly had left Freddy to clean up garbage at 100 Chestnut Street.

Respondent maintains that Perea was fired on July 15 because on two occasions, Caleca had seen Perea on his phone while someone else was working, and because Caleca had been told one night at the end of May 2016, Caleca received a call from one of the helpers that Perea had been allowing a homeless person to sleep in the building at night and that the homeless person defecated in the hallway. Caleca also testified that he did not trust him.

[14] Again, Vargas did not testify at the hearing, despite the fact her testimony would seemingly be critical to Respondent's version of events on this day.

Respondent maintains that it fired Batista on July 15 because Batista was not improving as an employee and his loyalties were with Nuñez. Caleca acknowledged being unhappy about Batista having sought more money back in late May, but stated the real issue was Batista's attitude, not his request for more money.

Respondent maintains Ochoa was initially fired on July 15 because, although he was "a good guy," he was also believe to be under bad influence from Nuñez, and therefore should be given the opportunity to prove himself. So, Ochoa was offered to return to his position, and Respondent maintains that Ochoa's performance improved after Nuñez was fired.

Respondent maintains that the discharged porters, Guerra and Belteton, were essentially collateral damage to their alleged changed business plan, as porters would no longer be needed. Alternatively, Brown testified that the motivation for getting rid of Batista, Perea, and the porters was their connection to Nuñez. The porters who were fired on July 15 were not replaced, although the superintendents were replaced.

Brown claims to have been unaware of any complaints made by Guzman about his work environment but remembers Guzman did have issues with Respondent's property managers because of complaints it received about Guzman. They included complaints that he would not perform work in a tenant's apartment because the tenant was gay and that Guzman had sex with a tenant on the roof. Guzman remains employed with Respondent.

ANALYSIS

This case is controlled by the Board's *Wright Line* analysis for determining when an allegedly discriminatory action violates the Act. In order to prove a violation, the General Counsel must first make a prima facie showing sufficient to support an inference that protected conduct was a motivating factor in the employer's terminating of the alleged discriminatees. *Wright Line*, 251 NLRB 1083 (1980), 10 enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399-403 (1983).

The General Counsel must initially show the employee's protected activity was a motivating factor in the decision to terminate. See *Coastal Sunbelt Produce, Inc. & Mayra L. Sagastume*, 362 NLRB No. 126, slip op. at 1 (2015). Establishing unlawful motivation requires proof that: "(1) the employee engaged in protected activity; (2) the employer was aware of the activity; and (3) the animus toward the activity was a substantial or motivating reason for the employer's action." *Consolidated Bus Transit, Inc*., 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009).

If the General Counsel makes that showing, the burden shifts to the employer to "demonstrate that the same action would have taken place even in the absence of the protected conduct." *Septix Waste, Inc.,* 346 NLRB 494, 496 (2006). An employer "cannot simply present a legitimate reason for its action, but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." W.F. Bolin Co., 311 NLRB 1118, 1119 (1993).

And if the employer's proffered reasons are pretextual - either false or not actually relied on - the employer fails by definition to meet its burden of showing it would have taken the same action for those reasons absent the protected activity. See *Boothwyn Fire Company No. 1*, 363 NLRB No. 191, slip op. at 7 (2016); *Pro-Spec Painting, Inc.,* 339 NLRB 946, 949 (2003); and *Hays Corp*., 334 NLRB 48, 49 (2001).

Here, notwithstanding Respondent's arguments to the contrary, there is an abundance of evidence that each of the alleged discriminatees had engaged in concerted activity. As an initial matter, the employees' testimony that they complained repeatedly to their supervisor, Nuñez, about their terms and conditions of employment, including the type and amount of work they were collectively being asked to do, and the fact that they had not been paid for some of the work they had done, was unrebutted and corroborated by Nuñez.

The employees also discussed wanting more money to perform the work with Nuñez, and in some cases, with Caleca directly. Although certain of these conversations were putatively about an individual employee's pay, individual action is still considered concerted "as long as it is engaged in with the object of initiating or inducing … group action." *Whittaker Corp.*, 289 NLRB 933 (1988) *citing Mushroom Transportation Co., v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). And, indeed, Caleca responded to employee demands for more money by speaking with Brown about increasing the bonus to be paid to ***all*** the superintendents, demonstrating management's understanding that these requests, even when made by individuals, were the initial step to achieving collective benefits.

Moreover, throughout the period from Spring 2016 until their termination, Respondent's employees were actively speaking to each other about their terms and conditions of employment, while also complaining to Nuñez about the new work they were all being asked to do and the pay Respondent was offering. Conversations among employees about their working conditions are concerted activity, regardless of whether those conversations were trying to change their working conditions. See *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enf. denied on other grounds 81 F.3d 209 (D.C. Cir. 1996), where the Board held that employee complaints to each other concerning schedule changes, which were not communicated to the employer, still constituted protected activity. See also *Hispanics United of Buffalo, Inc.*, 359 NLRB 368 (2012), finding employees' discussions about criticisms of their job performance was concerted activity.

The evidence demonstrated that all seven discriminatees spoke with each other about their respective complaints, regarding wages, hours, and work assignments and requirements. As such, I find that the discriminatees were engaged in protected concerted activity.

With respect to whether Respondent was aware of the employees' concerted activity, I note that Nuñez was the employees' direct supervisor and Respondent's Vice President of Field Operations. I found all of these employees to be credible in their testimony about their collective complaints to Nuñez, and I found Nuñez to be credible in his testimony about having spoken with the employees about their complaints, both individually and in their group meetings. Based on that testimony, and Nuñez's undisputed status as a statutory supervisor, and the employees'

primary management contact, I find that Respondent was on notice of the employees' complaints throughout the Spring of 2016.

In addition, I credit Nuñez's testimony that he repeatedly relayed the employees' complaints to Caleca and Brown. I found neither Caleca nor Brown to be credible witnesses in this matter. Both were evasive, and at times untruthful, in their testimony until repeatedly corrected or contradicted by their own written communications during cross examination. Indeed, the communications between Caleca and Brown make clear not only that they were advised on multiple occasions by Nuñez that the employees as a group were making complaints, their text messages demonstrated their own understanding that the employees as a group were resistant to their new work assignments and offers of pay, and their knowledge that employees were speaking to each other about their complaints. As such, I find the argument that Caleca and Brown were unaware of the employees' collective complaints over the course of this period borders on frivolous.

I further credit Nuñez's version of the events of July 15, 2016, when he relayed to Varga that the employees were complaining. Respondent's failure to call Varga, the only witness who could credibly dispute Nuñez's version of this critical moment, speaks volumes. I find that Nuñez told Varga that the employees were complaining, as a group, and that Varga relayed that information to Brown that day. Accordingly, I find that Respondent was aware of the discriminatees' concerted activity.

As for animus, Caleca and Brown clearly expressed their hostility toward the employees' complaints, both to Nuñez, and in their own communications between each other. They repeatedly told Nuñez to let the employees know that if they were not happy, they could leave. They also expressed their disdain for the employees with demeaning language revealing how they felt about their employees as a group.

In addition, Respondent terminated all of the complaining employees en masse following the final reporting by Nuñez of the employees' collective complaints. I find the timing of these discharges, all on the same day, and within hours of management's being made aware, for a final time,[15] that employees were collectively complaining about their working conditions, to be further evidence of Respondent's animus, and that the employees' concerted activity was a substantial and motivating reason for their discharges. As such, the General Counsel clearly met its initial prima facie burden.

With the burden shifted to Respondent to demonstrate that it would have taken the same action even in the absence of the protected conduct, I find that Respondent has failed to meet its burden, for a series of reasons. I do not find Respondent's alleged non-discriminatory business reasons for the terminations to be credible. Indeed, the proferred reasons for their decision to terminate the individual employees, all on the same day, reek of pretext.

[15] Ironically, were I to have credited the testimony of Caleca and Brown that Nunez had not previously told them about employee complaints, and instead July 15 was the first they learned of it, it might make the timing of their terminations all the more damning.

Initially, with regard to all of the discharges, Respondent claims to have made a change to its business plan, in which superintendents would no longer be performing renovation work. Notwithstanding that Respondent had admittedly already changed its plans on a regular basis, even assuming that this alleged change of plan was genuine, it fails to explain at all why it suddenly fired four superintendents, who it subsequently replaced, or why it suddenly fired its porters.[16] There is nothing inherent in Respondent's alleged change that would explain any of the terminations, not to mention their timing.

With regard to the alternative proferred reasons for the decision to terminate the individual employees, I will address each in turn[17]:

Respondent maintains that it fired Batista on July 15 because Batista was not improving as an employee and his loyalties were with Nuñez. As to the claim that his or any employees' loyalties were with Nuñez, I find that position actually strengthens, rather than weakens, the General Counsel's argument why these employees were chosen for termination. When Nuñez reported on July 15 that "the guys" were complaining, Respondent made quick work of discharging employees it thought were doing the complaining, and to Respondent, those loyal to Nuñez were the most likely culprits.

Moreover, Caleca acknowledged being unhappy about Batista having sought more money as early as late May, though he claimed the real issue was Batista's attitude, not his request for more money. Absent any credible evidence of Batista having an "attitude," I can only conclude that this is just code for the old-fashioned buzzword of "troublemaker." Respondent was specifically aware that Batista had spoken to Guzman about compensation in the past, and surely knew Batista was one of the complaining employees on July 15. I find Respondent's proferred reason for terminating him to be pretextual.

Respondent maintains Ochoa was initially fired on July 15 for poor performance. However, because he was "a good guy," and believed to be under bad influence from Nuñez, Respondent decided he should be given the opportunity to prove himself. So, Ochoa was offered to return to his position, and Respondent maintains that Ochoa's performance has since improved after Nuñez was fired. Again, I find this explanation hurts rather than helps Respondent's cause. Upon being made aware by Nuñez that employees were still complaining on July 15, Ochoa, as someone with a relationship to Nuñez, was considered one of the usual suspects, essentially rounded up to be discharged. Therefore, I find his discharge to also have been pretextual.

Respondent maintains that Flores was fired on July 15 because Caleca had a problem with his performance as well. Caleca testified that Flores was not at his building on multiple occasions when he was supposed to be, and that he was not cleaning the building properly. Nuñez allegedly agreed that Flores needed to be replaced, and Flores had actually been

[16] Indeed, Caleca testified that at the time of the discharges, Respondent was not yet clear whether porters would still be needed.

[17] As an initial matter, I note that this is not an employer otherwise quick to fire employees, as evidenced by the fact that Guzman is still employed, despite very serious allegations against him.

previously fired. However, after the first firing, Flores asked for his job back and Respondent gave him a second chance. Yet, despite initially taking him back, Respondent claims to have terminated him again when it suddenly learned that Flores had left "Freddy" to clean up garbage at 100 Chestnut Street. Having not presented Freddy as a witness, and left with Flores' uncontradicted testimony disputing this, I can only conclude that Respondent's alleged rationale for discharging Flores on July 15 was also a pretext.

Respondent maintains that Perea was fired on July 15 because on two occasions, Caleca had seen Perea on his phone while someone else was working, and because Caleca had been told one night at the end of May 2016, in a call from a helper who did not testify, that Perea had been allowing a homeless person to sleep in the building at night and that the homeless person defecated in the hallway. Caleca also testified that he did not trust Parea. Again, the alleged witness to this story was not called to testify, and again, I can only conclude that this proferred explanation was also pretextual.

Respondent maintains that the discharged porters, Guerra and Belteton, were essentially collateral damage to their alleged changed business plan, as porters would no longer be needed. Alternatively, Brown testified that the motivation for getting rid of Batista, Perea, and the porters was their connection to Nuñez.

The problem with these competing rationales, besides that they are in fact shifting explanations, is that neither is a credible reason for a lawful discharge. The change in business plan cannot support their being discharged because Caleca acknowledged that Respondent did not yet know at that time whether porters would still be needed. And the connection to Nuñez claim fails again, because it simply bolsters that General Counsel's argument that Respondent terminated employees it perceived to be the complainers.

Finally, Caleca was allegedly unhappy with Chambers and claims he would have fired him during his first week, because he thought that Chambers did lousy work. He allegedly continued to be unhappy with Chambers's work, skills and compensation. But Chambers was not terminated until the day Respondent suddenly decided to terminate all seven discriminatees, a few hours after Brown was advised that the employees collectively were complaining, and with no intervening fact or incident related to Chambers to credibly explain his sudden discharge. I do not credit Respondent's proferred explanation for discharging Chambers either.

Caleca and Brown acknowledged that they communicate thoroughly and often about everything that involves the business, and their text messaging confirms that they are in regular communication. I find that they knew their superintendents were objecting to the demolition work they were being asked to do, and other terms and conditions of their work, and that Respondent's decision to fire the discriminatees all together, porters and Chambers included, on the same day was motivated by their belief that those employees were now clearly complaining as a group, one which Caleca and Brown feared they could not control, either because they were too loyal to Nuñez or would not stop complaining, or both. As such, Respondent has failed in its burden to prove that it would have taken the same action even in the absence of the protected conduct

Accordingly, Respondent's *Wright Line* defense fails, and I find that that the General Counsel has proven that all 7 employees of Respondent at its apartment buildings in East Orange, New Jersey, alleged to have been fired for collectively complaining about working conditions were indeed fired in violation of the Act. These employees discussed their concerns regarding new duties with each other and their supervisor, who then relayed the complaints to Respondent's principals.

I therefore conclude that by doing so the Respondent discharged employees in violation of Section 8(a)(1) of the Act.

Conclusions of Law

1. On or about July 15, 2016, Respondent violated Section 8(a)(1) of the Act by discharging Jose Batista, Roger Ochoa, Alex Flores, Hector Perea, Jesus Guerra, Adolfo Belteton and Jerome Chambers in retaliation for their protected concerted activity.
2. The above violation is an unfair labor practice within the meaning of the Act.
3. The unfair labor practices committed by the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

As I have concluded that the Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Respondent, having discriminatorily discharged Jose Batista, Roger Ochoa, Alex Flores, Hector Perea, Jesus Guerra, Adolfo Belteton and Jerome Chambers, must offer them reinstatement and make them whole for any loss of earnings and other benefits resulting from that discrimination. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent shall also file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

In addition, Respondent is ordered to reimburse the discharged employees for all search-for-work-related expenses regardless of whether the discriminates received interim earnings in excess of these expenses overall or in any given quarter. *King Soopers, Inc.*, 364 NLRB No. 93 (2016).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, ProudLiving Companies, Inc., its officers, agents, and representatives, shall

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee for engaging in activity protected by Section 7 of the Act.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Jose Batista, Roger Ochoa, Alex Flores, Hector Perea, Jesus Guerra, Adolfo Belteton and Jerome Chambers full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Jose Batista, Roger Ochoa, Alex Flores, Hector Perea, Jesus Guerra, Adolfo Belteton and Jerome Chambers whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Compensate Jose Batista, Roger Ochoa, Alex Flores, Hector Perea, Jesus Guerra, Adolfo Belteton and Jerome Chambers for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

(d) Compensate Jose Batista, Roger Ochoa, Alex Flores, Hector Perea, Jesus Guerra, Adolfo Belteton and Jerome Chambers for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of each of the above employees and, within 3 days thereafter, notify them in writing that this has been done and that the discharge will not be used against them in any way.

(f) Preserve, and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(g) Within 14 days after service by the Region, post at each of the buildings at which it employed any of the affected employees copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 22 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or ceased operating at any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2016. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C November 3, 2017

Jeffrey P. Gardner
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT:

To organize
To form, join, or assist any union
To bargain collectively through representatives of your own choosing
To act together for mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT do anything to prevent you from exercising these rights.

WE WILL NOT discharge or otherwise discriminate against any employee for engaging in activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights under Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Jose Batista, Roger Ochoa, Alex Flores, Hector Perea, Jesus Guerra, Adolfo Belteton and Jerome Chambers full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL Make Jose Batista, Roger Ochoa, Alex Flores, Hector Perea, Jesus Guerra, Adolfo Belteton and Jerome Chambers whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL compensate Jose Batista, Roger Ochoa, Alex Flores, Hector Perea, Jesus Guerra, Adolfo Belteton and Jerome Chambers whole for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

WE WILL compensate Jose Batista, Roger Ochoa, Alex Flores, Hector Perea, Jesus Guerra, Adolfo Belteton and Jerome Chambers for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 22, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful termination of employees Jose Batista, Roger Ochoa, Alex Flores, Hector Perea, Jesus Guerra, Adolfo Belteton and Jerome Chambers, and within 3 days thereafter, notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

Proudliving LLC
(Employer)

Dated: _____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below:

20 Washington Place, 5th Floor, Newark, NJ 07102-3110
(973) 645-2100, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22-CA-180487 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (862) 229-7055.